Supreme Court, U.S.
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In The
Supreme Court Of The United States
October Term, 1998

ROSETTA M. SOARES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a defendant charged with conspiracy Use of a Telephone Facility with Intent to Commit Murder-For-Hire entitled to have her defense of entrapment decided by a jury, although she does not herself testify, where (1) the government's informant gives testimony which indicates the defendant's lack of predisposition, and (2) the defendant presents expert testimony?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

ROSETTA M. SOARES,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Rosetta Lee Soares, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-captioned proceeding on September 25, 1998 and January 29, 1999 (decision on petition for rehearing).

OPINIONS BELOW

The Memorandum of Opinion of the Court of Appeals for the Eleventh Circuit is not reported and is reprinted in the Appendix to this Petition, beginning at page App. A1. The ruling of the United States District Court for the Northern District of Georgia, is in transcript form and is reprinted in the Appendix, beginning at App. A6.

JURISDICTION

This case arose from an indictment under the criminal laws of the United States, specifically 18 U.S.C. § 1958, over which the district court has jurisdiction pursuant to 18 U.S.C. § 3231. The Court of Appeals for the Eleventh Circuit reviewed the final judgment pursuant to 28 U.S.C. § 1291. The Eleventh Circuit entered its decision on September 25, 1998, and defendant timely filed a petition for rehearing and suggestion for en banc consideration. This petition was denied on January 29, 1999. *See* App. A15. Accordingly, the instant Petition for Certiorari is being filed within 90 days of the Eleventh Circuit's final opinion and this court has jurisdiction to grant certiorari pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented involve a citizen's rights to due process and fair procedure pursuant to the Fifth Amendment of the United States Constitution, the text of which is set forth in the Appendix at page A16. The questions presented also involve the statute criminalizing the Use of a Telephone Facility with Intent to Commit Murder-For-Hire, 18 U.S.C. § 1958, the text of which is set forth in the Appendix at page A17.

STATEMENT OF THE CASE

Petitioner, Rosetta M. Soares ("Ms. Soares") was charged with one count of Use of a Telephone Facility with Intent to Commit Murder-For-Hire and one count of Causing Another to Travel in Interstate Commerce with Intent to Commit Murder-for-Hire. At her trial she introduced evidence showing that the government's principal witness, Anthony "Tony" Delgado ("Delgado"), a paid informant and close family friend to the defendant, had hectored her to transform a vengeful fantasy into action. Delgado testified concerning Ms. Soares intentions in a manner that placed her predisposition to commit the crime in doubt. Ms. Soares also presented the testimony of a qualified psychiatric expert, Dr. Saundra Maass-Robinson, who testified that Ms. Soares was depressed, susceptible to manipulation and was venting anger rather than planning a murder. In the face of this evidence, the district court nevertheless concluded that the government had proved predisposition to commit the crime beyond a reasonable doubt, and refused to instruct the jury on Ms. Soares' defense of entrapment. This resulted in a conviction on the first count, use of the telephone in a murder-for-hire, and Ms. Soares was sentenced to a prison term of five years.

The Underlying Facts

On October 20, 1992, Ms. Soares, a correctional officer for the City of Atlanta had a son, Macario, by her boyfriend, Tommie Nelson. After initially helping to support the child, in 1993 Nelson's financial and emotional support for the child declined. Nelson reneged on a house purchase contract, forcing Ms. Soares to borrow money from her mother. In February 1994, Ms. Soares filed a civil suit against Tommie, and in May 1994, she filed child abandonment charges.

The government's principal witness, Anthony Delgado, grew up in a Cape Verdean community in New Bedford, Massachusetts, and was a very close friend of Ms. Soares. Delgado was a career criminal and, unknown to Ms. Soares had worked for both the DEA and ATF as an undercover informant for 15 to 20 years. According to Delgado, he saw Ms. Soares at a family function in late 1993. At this function, Ms. Soares purportedly approached him and began a discussion concerning her problems with Nelson. They went outside and sat in Delgado's car. According to Delgado, Ms. Soares told him "I want him [Nelson] to be gone."

Delgado testified that he called Ms. Soares in Atlanta a couple of weeks later and said he would come to Atlanta to "murder Tommie Nelson." App. A19 (Excerpts from Trial Transcript are included in the Appendix at App. A18) According to Delgado, "She didn't believe me at first and -- she didn't believe me" *Id.* Delgado then asked Ms. Soares if this was something she really wanted to do, and according to him she said yes. *Id.* Delgado told her he would get in touch with her. However, Delgado admitted that he took no steps toward carrying out this alleged plot to kill Nelson "because I didn't think it was something she really wanted to do and I wasn't really interested in getting involved at the time. I just put her off, kept putting her off." *Id.* Delgado further testified that "from the beginning I didn't know if she really wanted to do this. I didn't . . . figure she'd have second thoughts after it was done." App. A19.

During the entire year of 1994 following this alleged telephone call initiated by Delgado, neither Ms. Soares nor Delgado did anything with regard to what was said about Tommie Nelson in late 1993. In fact, Delgado did not recall communicating with Ms. Soares at all during 1994.

On September 17, 1995, Delgado initiated a 39-minute telephone call to Ms. Soares. According to Delgado, it was during this unrecorded conversation that Ms. Soares again brought up the

subject of her problems with Nelson, and also mentioned Nelson's involvement in drug trafficking. After this telephone call Delgado went to Agent Stephen Foster, an FBI agent with whom Delgado was working on another case as an undercover informant. Foster gave Delgado a tape recorder with a mike to be attached to his telephone to record his conversations with Ms. Soares.

On October 11, 1995, Delgado initiated the first taped telephone call to Ms. Soares to see if she was still coming to New Jersey to visit. During this conversation, Ms. Soares indicated she was not coming to New Jersey, and that she was in a rush to get to a meeting and would call him back later. She did not return the call.

In spite of Ms. Soares' indication on October 11th that she was not going to New Jersey, Delgado initiated a second taped call to Ms. Soares on November 7th, ostensibly to ask if she was coming to New Jersey because he had not heard from her for a month or more. During this second taped conversation, Delgado raised the issue about going to Atlanta and dealing with Nelson when he asked Ms. Soares, "Do you still want to do this?"

On November 9, 1995, Delgado initiated another taped telephone call to Ms. Soares, to confirm with her that he would be traveling to Atlanta. However, Ms. Soares was not at home so he left a message on her answering machine asking her to call him back. Delgado placed another call to Ms. Soares on that same date at approximately 8:05 p.m. During that conversation Ms. Soares said she was going to Jamaica so Delgado should not travel to Atlanta.

On Monday, November 13, 1995, Delgado placed another taped call to Ms. Soares at approximately 11:05 p.m. Ms. Soares indicated she had just walked in the door from her trip to Jamaica, had not even taken off her coat and said she would call him back.

Ms. Soares did not call Delgado back. Delgado called Ms. Soares back that evening but she did not answer the telephone.

The next taped call initiated by Delgado to Ms. Soares was on November 14, 1995. On November 15, 1995, Delgado and Agent Foster traveled to Atlanta. Delgado called Ms. Soares at her office to let her know he was in Atlanta and was just waiting to get together with her to set up his plan of what they were going to do. When he called the office, he learned that Ms. Soares was out of the office. He then called and left a message on Ms. Soares' home answering machine indicating he was in Atlanta and would call her later. He then called again and spoke with Ms. Soares, who exclaimed "You're here?"

On November 21, 1995, Delgado initiated yet another taped call to Ms. Soares. The conversation switched from Tommie Nelson to his wife. Ms. Soares again tried to put off the conversation, telling Delgado to call back after Thanksgiving. On November 25, 1995, Delgado initiated another taped call to Ms. Soares. In this conversation, Ms. Soares responded to Delgado's questioning concerning Nelson by stating "I don't want to do it." On November 26, 1995, Delgado initiated the final taped call to Ms. Soares. This time he was calling Ms. Soares about making plans to come to Atlanta and murder Nelson and his new wife. Ms. Soares stated that Nelson's new wife was out of town, and that he could come down to Atlanta if he wished but that she doubted that he would be able to locate Nelson.

During the above-described telephone calls, all initiated by Delgado, Ms. Soares made a variety of statements concerning her frustrations with Nelson. There were several statements that seemed to indicate a willingness to participate in a murder-for-hire scheme, with Nelson as the target, but there were also several statements by Ms. Soares in which she would express hesitation or outright refusal to participate in such a plan. Ms. Soares would also often attempt to

put off or delay Delgado, and often emphasized that she doubted Delgado would be able to carry out the plan.

The Proceedings Below

Ms. Soares was arrested on November 30, 1995 and charged with one count of Use of a Telephone Facility with Intent to Commit Murder-For-Hire and one count of Causing Another to Travel in Interstate Commerce with Intent to Commit Murder-for-Hire. Prior to trial, pursuant to Rule 12.2(b) of the Federal Rules of Criminal Procedure, the defense notified the government of its intent to use expert testimony regarding Ms. Soares' state of mind as it related to the entrapment defense. At trial, Ms. Soares presented a defense of entrapment, and in furtherance of that defense requested that Dr. Saundra Maass-Robinson a psychiatrist in private practice in Atlanta, be allowed to testify concerning her treatment of Ms. Soares for depression and to provide expert testimony concerning her mental state. After a proffer, the court allowed Dr. Maass-Robinson to testify as an expert on the issue of her state of mind as it related to the threats towards Nelson recorded in the taped conversations.

Dr. Maass-Robinson testified based on her examination of Ms. Soares and her review of both the transcribed and tape recorded conversations between Ms. Soares and Delgado. App. 20. Her opinion was that Ms. Soares' was depressed, and that her behavior during the relevant time period was at times confused, disorganized and reckless. *Id.* Ms. Soares had constructed an ugly fantasy concerning Nelson due to her ongoing problems concerning him. In order to alleviate her emotional turmoil, Ms. Soares would "vent" this fantasy to a close, personal friend, Delgado, whom she could trust and who would understand her. App. 20-24. Dr. Maass-Robinson testified that the randomness and the lack of commitment displayed by Ms. Soares in her conversations suggested not a purposeful series of actions being planned on her part, but rather a

random use of various techniques and means to vent anger. App. A21.

On the next-to-last day of trial, the defense rested, without calling Ms. Soares to testify. After the jury was excused, the prosecution requested that the court not instruct the jury on the entrapment defense because there was no issue as to predisposition. The prosecution argued that Delgado's testimony regarding the predisposition stood uncontested. After brief argument, the court granted the prosecution's request, stating that:

> I disagree with you on that, and from the standpoint of the finding in that regard, I think there is predisposition. Her testimony was that she may have used the language--and let's, from your standpoint, accept that she wanted him to be gone. But there was no doubt in my mind and I don't think any doubt in Mr. Delgado's mind that what they were talking about was to kill him, to eliminate him.

App. A11. Ms. Soares' counsel requested clarification as to the judge's ruling:

> Is your honor ruling as a matter of law that the government has proved predisposition . . . ?

App. A12. The court responded:

> I think they have, there's nothing to the contrary.

Id.

During deliberations, the jury sent a question to the court asking whether they could consider an entrapment defense in connection with the first count. App. A25. The court instructed them that they could not. On December 18, 1996, the jury found the defendant guilty on Count I of the indictment but "hung" on the second count. The Court accepted the guilty verdict on Count 1 of the indictment

and declared a mistrial on Count II of the indictment. The district court granted Ms. Soares bond pending the outcome of her appeal.

Ms. Soares appealed her conviction to the Court of Appeals for the Eleventh Circuit, based on the court's refusal to instruct the jury on entrapment, arguing that there had been evidence presented to create an issue on predisposition (i.e., Delgado's testimony regarding his impression of Ms. Soares intentions and Dr. Maass-Robinson's testimony), and that the judge had actually usurped the jury's role as the trier of fact by drawing inferences from Delgado's testimony. In a per curiam decision issued without oral argument, the Circuit denied the appeal. The panel agreed with the district court that the government had proved through undisputed evidence that Ms. Soares was predisposed to commit the crime. The brief decision focused on Delgado's initial testimony that Ms Soares stated that she wanted Nelson "gone." App. A4-A5. The panel also referenced statements made by Ms. Soares in her taped conversations that indicated that she had been trying to persuade Delgado for "a whole year, two years now" and "sixteen times." App. A5. The opinion made no reference to Delgado's conflicting testimony or Dr. Maass-Robinson's testimony. The Circuit denied Ms. Soares petition for rehearing, App. A15, but granted a stay of mandate pending the outcome of this petition.

REASONS FOR GRANTING REVIEW

I. The Eleventh Circuit's Decision Misapplies the Clear Law on a Defendant's Right to present an entrapment defense to the jury.

Both the district court and the appellate court cited the correct legal standard for determining when the jury could consider a defense of entrapment. The general rule is that the matter should go to the jury for the ultimate decision. *See, e.g., Mathews v. United*

States, 485 U.S. 58, 61 108 S.Ct. 883, 99L.Ed.2d 54 (1988) (reversing and remanding case where district court failed to instruct jury on entrapment); *United States v. Bradfield*, 113 F.3d 515, 521 (5th Cir. 1997) (stating that where the defendant properly raises the defense of entrapment, "the district court errs reversibly by not adequately charging the jury on the theory of entrapment"); *United States v. Timberlake*, 559 F.2d 1375, 1379-80 (5th Cir. 1977) ("A trial judge commits reversible error when he fails to instruct the jury on a theory of defense for which there is any foundation in the evidence"); *United States v. Brown*, 43 F.3d 618, 622 (11th Cir. 1995) ("Entrapment is generally a jury question."). The defense of entrapment is a fact-intensive inquiry which is within the province of the jury. *Brown*, 43 F.3d at 625 ("the fact-intensive nature of the entrapment defense often makes jury consideration of demeanor and credibility evidence a pivotal factor"). In fact, it has been held that there are only two ways the entrapment defense is *not* decided by the jury: (1) the defendant fails initially to raise sufficient evidence of inducement, *see, e.g.*, *United States v. Quinn*, 123 F.3d 1415, 1423 (11th Cir. 1997); or (2) the judge makes the extraordinary ruling that, *as a matter of law*, the government has proved predisposition beyond a reasonable doubt.

In this case, Ms. Soares more than satisfied her initial burden in producing evidence of inducement. Both the district court and the Eleventh Circuit instead relied on the "uncontested" evidence of predisposition in denying the defense of entrapment. See App. A12 (district court) and App. A4-A5 (appellate court). The error occurred in the district court's refusal to recognize evidence presented by the defense as contesting predisposition, and the appellate court's failure, upon *de novo* review, to realize that the district court had erroneously placed itself in the position of the trier of fact.

In making its ruling, the district court relied upon the initial contact between Delgado and Ms. Soares to which Delgado testified.

The court placed particular emphasis on the alleged statement by Ms. Soares that she wanted Nelson "gone." Counsel for the defense pointed out the vagueness of that phrase, and that Delgado himself had testified that he doubted Ms. Soares intentions and her seriousness, creating an issue for the jury as to Ms. Soares' disposition. The judge then assumed the role of the finder of fact, stating that "there was no doubt" in his mind, "and I don't think any doubt in Mr. Delgado's mind that what they were talking about was to kill [Nelson]." On appeal, the panel agreed with the judge that this "undisputed" evidence justified not instructing the jury on entrapment. By failing to recognize the factual issue as to predisposition created by Delgado's own testimony, both courts deprived Ms. Soares of her right to have her defense heard by the jury.

The district and appellate courts also relied on the "corroborating" statements made by Ms. Soares in the taped conversations, specifically her statements that she had previously discussed the alleged plan with Delgado for "a whole year, two years now" and "sixteen times." In doing so, however, both courts completely disregarded the testimony of Dr. Saundra Maass-Robinson. The testimony of a psychological or psychiatric expert is admissible in relation to a claim of entrapment to show that a defendant's mental condition makes her particularly susceptible to inducement. *United States v. Newman*, 849 F.2d 156, 165 (5th Cir. 1988) ("expert psychiatric testimony is admissible to demonstrate that a mental disease, defect or subnormal intelligence makes a defendant peculiarly susceptible to inducement");*United States v. Hill*, 655 F.2d 512, 516 (3rd Cir. 1981) ("An expert's opinion, based on observation, . . . may aid the jury in its determination of the crucial issues of inducement and predisposition");*United States v. Beneviste*, 564 F.2d 335, 339 (9th Cir. 1977) ("expert testimony on the issue of predisposition may be admitted") (citing *United States v. Mosely*, 496 F.2d 1012, 1017 (5th Cir. 1974)). In accordance with this principle, the district court found Dr. Maass-Robinson's

testimony relevant to the matter of Ms. Soares' mental state and allowed her to testify.

Dr. Maass-Robinson proceeded to testify that Ms. Soares was susceptible to inducement because of her state of mind at the time of these conversations, combined with the relationship of trust with Delgado. She further testified that while Ms. Soares' conduct during her conversations with Delgado demonstrated ambivalence and a lack of commitment to pursuing murder-for-hire, Delgado took advantage of her in a manipulative way. In Maass-Robinson's opinion, Ms. Soares lacked the purposefulness to carry out the scheme and was just venting anger; Delgado's action pushed Ms. Soares to say things to him that she would not have otherwise said. This would include the "corroborating" statements on predisposition relied on by both courts. Once the district court allowed Ms. Soares' expert to testify as to her state of mind, the expert's explanation of Ms. Soares' statements and conduct should not have been removed from the jury's consideration. Dr. Maass Robinson's testimony supported the argument that Ms. Soares was not predisposed to commit the criminal offense charged, but was ignored completely by both courts.

In the analogous case of *Sorrells v. United States*, 287 U.S. 435, 53 S. Ct. 210, 77 L.Ed. 413 (1932), the defendant had been convicted for the possession and sale of intoxicating liquor. However, evidence was presented that the defendant had been persuaded to sell the illegal liquor to a government agent "by repeated appeals to defendant's sympathy for a fellow war veteran." *United States v. Kaminski*, 703 F.2d 1004 (1983) (citing *Sorrells, supra.*) The *Sorrells* Court found that the agent "lured defendant, otherwise innocent, to [the crime's] commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War." *Sorrells* at 441. The Court determined that the trial court was in error "in holding that as a

matter of law there was no entrapment and in refusing to submit the issue to the jury." *Id.* at 452.

The trial court had evidence before it from the testimony of Delgado and the testimony of Dr. Maass-Robinson that the longstanding, close relationship between Ms. Soares and Mr. Delgado led her to say things to him, in her vulnerable and fragile mental state, that she would not have said to anyone else and which were mere manifestations of her fantasies. Indeed, the evidence presented demonstrated that it was Delgado who was pressuring Ms. Soares, just as the government agent in *Sorrells* pressured his "war buddy." Delgado lulled her into the commission of this crime through his repeated calls and urging that she hire him to fulfill her fantasy: to make her problems all "go away."

Despite this evidence, the district court made the extraordinary ruling that the government had proved predisposition beyond a reasonable doubt as a matter of law. Accordingly, the district court determined that no jury instruction was required. The appellate court affirmed this decision. However, as demonstrated above, Ms. Soares did present evidence placing her disposition to commit the crime at issue. Ms. Soares was therefore entitled under the Fifth Amendment to present her defense of entrapment to the jury. This court should grant certiorari to correct the Eleventh Circuit's gross failure to apply the clear law that if there is any foundation in the evidence, a defendant is entitled to present a defense of entrapment.

II. The Eleventh Circuit's Decision Implies That Ms. Soares must Take the Stand in Her Own Defense and Thereby Violates Her Constitutional Rights.

It is a bedrock principle that under the Fifth Amendment, a defendant has the right not to testify without prejudicing herself. In this case, the Court of Appeals affirmed the district judge's holding that Ms. Soares had presented no evidence to dispute the

government's evidence of predisposition. As shown above, that decision failed to account for the conflicting testimony of Delgado and the testimony of Dr. Maass-Robinson. By doing so, the Eleventh Circuit not only fails to correct the district court's usurpation of the jury's role, but it also implicitly suggests that the only evidence that could dispute the government's case on predisposition would be testimony from Ms. Soares.

The Circuit's opinion first focuses on the initial statement by Ms. Soares that she wanted Nelson "gone," stating that there was "no evidence that Delgado had suggested anything her." This type of evidence could only have come from Ms. Soares, the only other party to the conversation. The opinion further stated that Ms. Soares offered no evidence to contradict her recorded statements that she had been trying for some time to persuade Delgado. Aside from missing the point of Ms. Soares'' defense, as discussed *supra*, the panel again appears to require evidence from Ms. Soares herself to dispute these recorded statements. This is in direct violation of Ms. Soares' Fifth Amendment rights, a violation this Court should address.

CONCLUSION

WHEREFORE, this Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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In The United States Court of Appeals
For The Eleventh Circuit

No. 97-8548
Non-Argument Calendar

D. C. Docket No. 1:96-CR-167-1 WCO

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROSETTA LEE SOARES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(September 25, 1998)

Before HATCHETT, Chief Judge, BARKETT, Circuit Judge, and HILL, Senior Circuit Judge.

PER CURIAM:

In 1996, a jury found Appellant Rosetta Soares guilty of Count 1, using and causing another to use a telephone facility, in interstate commerce, with intent that a murder be committed in exchange for a promise to pay money. 18 U.S.C. § 1958.[1] She was sentenced to a sixty-month prison term followed by two years of supervised release. Soares is currently free on bond pending appeal.

Soares raises only one issue on appeal: that her constitutional rights were violated when the district court refused to instruct the jury on the defense of entrapment during its pre-deliberation charge to the jury. Under a *de novo* review, we conclude that the district court did not err in its refusal. We affirm Soares' conviction and sentence.

I.

On October 20, 1992, Soares, a correctional officer for the City of Atlanta, and her boyfriend, Tommie Nelson, an alleged drug trafficker, became parents of a young son, Macario Nelson. The trial record reflects that for approximately eighteen months, from June 1992 through late 1993, Nelson supplied Soares with money to support herself during the later stages of her pregnancy, after she had quit her job, and later to support herself and their child. By December 1993, however, Nelson's financial and emotional support to the pair began to decline. During this period, Nelson reneged on a house purchase contract, forcing Soares to borrow money from her mother in order to close. In February 1994, Soares filed a civil suit against Nelson. In May 1994, she filed child abandonment charges.

During this same time frame, sometime in late 1993, Soares attended a family function in her home state of Massachusetts and encountered childhood friend Anthony Delgado. Delgado, although an admitted career criminal, was like a member of Soares' family. Soares did not realize that Delgado had theretofore been an

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[1] Count 2 alleged that Soares caused another to travel in interstate commerce with intent that a murder be committed in exchange for a promise to pay money. 18 U.S.C. § 1958. When the jury indicated that they were unable to reach a unanimous verdict as to Count 2, a mistrial was ordered as to that count.

informant, both for the ATF and the DEA, intermittently for fifteen to twenty years. Soares told Delgado that she wanted to talk to him. Delgado agreed. He left the party and went to a neighborhood bar. Soares later joined him. They went outside and sat in Delgado's car. It was there, according to Delgado, that Soares, referring to Nelson, told Delgado that "I want him to be gone" and asked Delgado "if he could take care of that for her" in Atlanta. Delgado testified that Soares was very "angry," "use[d] swear words," and Delgado took her seriously. There was no evidence that Delgado introduced the subject of murdering Nelson

Several weeks later, after Delgado had returned to his home in New Jersey, he called Soares in Atlanta. Delgado testified that Soares "talked about Tommy again and wonder[ed] when I was coming down. Then she told me that I was full of shit; I wasn't going to come down. She says, 'You're a liar, Tony. You ain't going to come take care of this.'" Delgado responded by asking her "if it was something she really wanted to do" and by so doing, put Soares off. These types of telephone conversations continued for the next eighteen to twenty months, one or two times a month.

By September 1995, Soares complained that Delgado was unreliable and stated that she would find someone else to do the job. Now concerned, Delgado went to the FBI in October 1995. He agreed to assist them in an undercover investigation of Soares and began tape recording his conversations with her.[2] Soares was arrested in November 1995.

II.

Soares claims that she was denied the opportunity to advance a valid defense when the district court refused to instruct the jury on the defense of entrapment. By so doing, Soares claims the district court committed reversible error, entitling her to a new trial. The government contends that: (1) Soares provided no evidence of government inducement to commit the crime; and (2)

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[2] During one of these conversations, Soares is recorded stating that she had been trying to persuade Delgado to commit the murder for "whole year, two years now" and that she had told him "sixteen times" that she wanted him to do it and that he had ignored her.

that the government provided ample, uncontroverted evidence of Soares' predisposition to commit the crime.

III.

Entrapment occurs "when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells v. United States*, 287 U.S. 435, 442, 53 S.Ct. 210, 213 (1932). A valid entrapment defense has two related elements: (1) government inducement of the crime, and (2) a lack of predisposition on the part of the defendant to engage in criminal conduct. *Mathews v. United States*, 485 U.S. 58, 63, 108 S.Ct. 883, 886 (1988). The defendant bears the initial burden of production to show government inducement. *United States v. Ventura*, 936 F.2d 1228, 1232 (11th Cir. 1991) *citing United States v. Parr*, 716 F.2d 796, 802 (11th Cir. 1983). To satisfy this burden, the defendant must demonstrate not merely inducement or suggestion on the part of the government but "an element of persuasion or mild coercion." *Id.* Even if a defendant makes a showing of inducement, a district court need not submit the matter of entrapment to the jury "[i]f the government's evidence of propensity [to commit the crime] stands uncontradicted." *Mathews*, 485 U.S. at 59 n.1, 62, 108 S.Ct. at 884 n.1, 886. Inducement by a private citizen cannot support a claim for entrapment. *See United States v. Mers*, 701 F.2d 1321, 1340 (11th Cir.) ("A defendant cannot avail himself of an entrapment defense unless the initiator of this criminal activity is acting as an agent of the government."), *cert. denied*, 464 U.S. 991, 104 S.Ct. 482 (1983).

IV.

Applying the law to the facts presented here, under undisputed evidence, Soares was predisposed to commit the crime for which she was convicted (Count 1) in late 1993, when she asked that Delgado meet her after the party, and spoke with him in his car outside a Massachusetts lounge. It was there that Soares told Delgado that she "want[ed] him [Nelson] to be gone." Delgado first considered murdering Nelson after Soares solicited him to do the deed. There was no evidence that Delgado suggested anything to her. Even had Delgado initiated the conversation on this subject --

and there was no evidence that he did -- he was a private citizen, not then a government agent. *Mers*, 701 F.2d at 1340.

The record also reflects that Soares offered no evidence to contradict her 1995 recorded statements that she had been trying to persuade Delgado to commit murder for "a whole year, two years now" and that she had told him "sixteen times" that she wanted him to do it. Soares therefore fails to meet her burden of establishing that the government created a substantial risk that the offense would be committed by one not disposed to so. *Mathews*, 485 U.S. at 63. Soares did, after soliciting Delgado to commit murder, occasionally express some reservation about following through with the plan. However, the actions of Delgado, who had then become a government agent, in continuing to call Soares and question her about what she wanted to do, were far too late to be considered entrapment of Soares into the commission of Count 1.[3] There was no evidence sufficient to warrant submission of the entrapment defense to the jury. *Id; United States v. Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985) *cert. denied*, 474 U.S. 1064, 106 S.Ct. 815 (1986).

V.

Accordingly, the district court properly declined to instruct the jury on entrapment and the conviction and sentence of Soares are affirmed.

AFFIRMED.

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[3] Whether or not they would be evidence of improper government conduct vis-à-vis Count 2 (causing another to travel with intent to commit murder) need not be explored, as Count 2 is not part of this appeal.

The Court: I'll be ready to go over those with you briefly. We had an issue concerning a lesser included offense, and you were going to indicate whether you did or did not want that given.

Mr. Moniz: I do not want that included, your honor.

The Court: What's the government's position in regard to that? You were very ambivalent about it or a lot of -- you really weren't ambivalent; you were very hesitant about it yourself.

Mr. Moniz: Or inconsistent.

The Court: Or inconsistent.

Mr. Rufolo: I leave it to the discretion of the court, and I think there is some reasonable view of the evidence that could support it, but if the defendant isn't requesting it, then I wouldn't pursue it. But I would, however, your honor, ask that the court consider the case of United States versus Johnson, which is at 14 Fed. 3d 766. It's a Second Circuit opinion, 1994, and on page 771 of that opinion, the court indicated that, even if a defendant makes a showing of inducement, the district court need not submit the matter of entrapment to the jury if the government's evidence of propensity to commit the crime stands uncontradicted, and that was the case that I was relying upon. I didn't accurately cite it when we were in chambers on Friday afternoon because I didn't have it with me.

The Court: If you want to give me a copy of it, I will review it, but I think as to nothing else other than the second count, there is enough factually, I think, to justify giving the entrapment charge.

Mr. Rufolo: Judge, I would just ask that the court --

The Court: I'll read that case in the morning, but --

Mr. Rufolo: and consider the testimony concerning -- which has been uncontradicted -- about the defendant approaching mr. delgado back in 1993.

The Court: I agree with you. As to count 1, I think I would agree with you. I'll read your case, but as to count 2, that offense had not been, I don't believe, committed until the 14th or 15th of November somewhere.

Mr. Rufolo: but I would ask the court to recall --

The Court: And those telephone calls immediately preceding that, the jury could -- I think there's enough in those

conversations for me to allow that to go to the jury based on those calls as to that count.

Mr. Rufolo: Jjudge, may I just respond to that briefly?

The Court: All right.

Mr. Rufolo: With respect to that count, I would just suggest to the court that, again, it's been uncontradicted that the defendant said to Mr. Delgado, you know, "I want you to come to Atlanta in order to perform this act," and the second count does not require an intent that someone travel. It's a jurisdictional element. And as we discussed earlier, if the defendant formulated some predisposition to have Mr. Delgado kill tommy nelson, given the fact that Mr. Delgado lived in New Jersey, Tommy Nelson lived in Atlanta, in conjunction with the testimony that the defendant asked him to come to Atlanta to perform the act, then if such predisposition existed and is uncontradicted, as I submit it is, then according to Johnson, the district court need not submit the matter of entrapment to the jury.

Mr. Moniz: Just briefly.

The Court: Have you got a copy of that decision?

Mr. Rufolo: I will get a copy of it for your honor. I have my copy.

The Court: Well --

Mr. Moniz: Can you make a copy for me? Because I didn't have the cite.

The Court: Well, give me the cite. We can get it.

Mr. Rufolo: The cite is 14 Fed. 3d 766, and my specific reference is to page 771.

Mr. Moniz: Your honor, not disputing the Second Circuit, being a practitioner in that circuit, I would respectfully suggest that I disagree with Mr. Rufolo's recitation of the facts in that this is undisputed. There was a very distinct and clear statement by the defendant in, I believe, the November 24, 1995, tape recording, in which she says, "I did not want you to come here," referring to the past.

The Court: Well, that's after the fact.

Mr. Moniz: But I understand, but my point is only that there's a question of fact as to that, including the evidence would

suggest is a question of fact. The only evidence of it that she wanted him was --

The Court: And those calls of the 24th -- and 26th, was it? Or the 22nd and 24th, whatever. I believe 24th and 26th.

Mr. Moniz: and there certainly are statements prior to that by the --

The Court: The crimes were both committed by that time.

Mr. Moniz: Iif they were committed, the alleged crimes would have been by that time perhaps.

The Court: Well, I don't think there's any question but what they were committed. There may be some question about the intent, but the events had occurred, that is, the use of the telephone or wire communications and the use of interstate transportation, traveling in interstate commerce. Now, whatever's said there I don't think can undo self-serving statements that are made at that time. Those statements are made after. According to the testimony I heard that was presented by the defendant, the defendant had been counseled by her friend. I believe his name was Solomon, Mr. Solomon.

Mr. Moniz: Yes, your honor.

The Court: That to get out of this, and apparently for the first time she was following the advice of some of the -- two people who advised her to get about her life. The other one's name I can't recall right now.

Mr. Rufolo: Mr. Artis.

The Court: Solomon.

Mr. Rufolo: Mr. Artis.

The Court: I guess it was Mr. Artis, but Mr. Solomon I believe was the one though that had counseled her, according to his testimony, at the time of the trip down here, and you can see the very distinctive turnaround and attitude. Apparently, at that time she was following that advice. At least that's what appeared to the court.

Now, again, I'm not sure that that -- the psychiatrist was not questioned about that, and I'm not sure she was aware of it. I started to go back and ask the psychiatrist some of the questions that I had asked her this morning out of the presence of the jury, but I decided

against it. And that could have been one of them because that was one of the things on which she had not apparently had information.

My opinions and my observations are based more upon those pretravel phone calls which were dated -- which were immediately preceding, without my looking in the notebook, but immediately preceded the trip down. There was some indication there she was saying, "don't you come," or, "you can come for" --

Mr. Moniz: Visit.

The Court: "You can come visit me any time" --

Mr. Moniz: Right.

The Court: "You want to. No need to come down for that."

Mr. Moniz: I think she said, "as a friend."

The Court: and that's what, to me, may generate an issue of fact as to count 2. I'm not sure that her comment on the 24th of November adds much to it except to maybe corroborate the prior statement, but it certainly, standing alone, does not contribute anything.

Mr. Rufolo: Well, your honor --

The Court: It may, to the extent that it corroborates the pretravel statement.

Mr. Moniz: Just one comment in that regard, your honor. I'm not sure that I agree with the court in terms of the effect of Mr. Solomon's admonitions because those admonitions came early on, as early on as pregnancy.

The Court: Well, I may have them confused as to which it was. There was one of them that, the way I understood it -- I took particular note; that I thought the testimony was that it was during the visit or immediately following it -- I've forgotten exactly -- that he told her to cut this thing off and get on about her life and more -- I got the impression in rather strong terms, and I thought it was Solomon, but it may have been the other one.

Mr. Moniz: It was, your honor, and I agree with you that he did say --

The Court: And I noted that the next phone call, which was a day or two later or a few days later, there was a very different approach and very different attitude on the part of -- this is my

observation. The jury may not see it the same way. That's for the jury to determine. They may not see it the same way.

Mr. Moniz: I guess the reason I raise that is because there was a time gap. He was away. But more importantly, he had made similar, maybe not as strong, admonitions, as I recall the testimony.

The Court: Oh, he'd made them on --

Mr. Moniz: Right.

The Court: -- based on his testimony, on more than one occasion.

Mr. Moniz: Right. That's the only reason I raise it.

The Court: But I remember there was one that came -- by his testimony, that came either -- it was either the day of the trip or immediately thereafter when he gave her some rather strong advice. At least that was the impression I got from it. And my reaction and observation was that she followed it, apparently, for the first time.

Mr. Moniz: I guess I just differ on that, but that's neither here nor there. It's the jury.

But the other thing I wanted to raise just briefly, your honor, is that, with regard to the first count, Mr. Rufolo suggests to the court, and the court apparently appears to agree, that as to the issue of predisposition, that the -- I take it the conversation -- first of all, we have recorded conversations only beginning in October, October 11, 1995. And there's been testimony, undisputed testimony, that approximately in December of 1993, there was a conversation between the defendant and Mr. Delgado.

But as I recall Mr. Delgado's testimony -- and I had it transcribed specifically for that reason, and cross-examined him about it -- he said that she said something to the effect that she wanted him to be gone. He then testified that he did not take it that she really wanted to do this, kill him, that is, at that time. So that all we've got factually here is for a jury to decide whether or not she was predisposed. The jury can decide that she was predisposed to doing this; therefore, entrapment would not apply. But I don't think that's the factual or uncontroverted fact because I don't think what Mr. Delgado said suggests that there's any intent to have Mr. Nelson killed.

The Court: I disagree with you on that, and from the standpoint of the finding in that regard, I think there is predisposition. Her testimony was that she may have used the language -- and let's, from your standpoint, accept that she wanted him to be gone. But there was no doubt in my mind and I don't think any doubt in Mr. Delgado's mind that what they were talking about was to kill him, to eliminate him.

Now, what words they used, I don't know that they ever used the word "murder" anywhere, but it's obvious that's what they were talking about. What words they used is really unimportant as long as the parties dealing with it had a mutual understanding of what they were talking about, and there was no doubt in my mind in that regard that that's what they were having.

Now, he did not say ever that he thought she didn't want to do it. He said he had hoped she would not, is my recollection, or he thought she might change her mind or he hoped she didn't want to go through it.

Mr. Moniz: If your honor please, I think --

The Court: But I don't believe he ever said affirmatively that she didn't want to.

Mr. Moniz: He said this, your honor. And pardon my language, but I'm quoting it. He said he told her she's full of shit in terms of wanting to do this, and on cross-examination I inquired of this at length and whether he, Mr. Delgado, believed that she intended to do it at that time when she said that. And I believe he said that he did not at that time believe it. He didn't take -- I think he said he didn't take her seriously.

But the point is that this is a factual determination. You may believe that he was -- she was predisposed, I may believe otherwise, but I think it's for the jury to decide, based upon the evidence that it's heard, whether or not the defendant was predisposed in December of '93, or after that, for that matter, to commit this crime. And I think, based upon the scenario of events, your honor, there's a serious question of whether there's predisposition in this case, and it's the government's burden to prove beyond a reasonable doubt. Not our burden to suggest it, but the government must prove beyond a reasonable doubt as a factual

matter that there's predisposition. It seems the court is determining as a legal matter that there was predisposition, and I respectfully disagree with that, your honor.

The Court: Well, I question that there's anything that controverts it.

Mr. Rufolo: Especially when --

Mr. Moniz: I think the statements of Mr. Delgado controvert it.

Mr. Rufolo: Especially when one considers the defendant's own statements.

The Court: Well, that statement of the recording on November the 14th --

Mr. Rufolo: That's correct.

The Court: -- supports that very well when she says, "I asked you to do it 16 times, and now you're changing your mind." That, to me, corroborated it all. I have no problem with the predisposition issue. That's there.

Mr. Moniz: Is your honor ruling as a matter of law that the government has proved predisposition on the first count?

The Court: I think they have. There's nothing to the contrary.

Mr. Moniz: I just for the record would say that Mr. Delgado, in that conversation, talked about seven months before, which would place it in 1995. Now, obviously, there had been other things going on in that time period.

As I understand predisposition for purposes of entrapment, one has to show -- the government has to prove beyond a reasonable doubt that she was predisposed to committing this. And the jury may not believe him, because we have to remember, this is not an act that was committed. This is all based upon the testimony of a witness that the jury may find not to be reliable, and so it is a factual matter, and particularly in the words that he used and when he was -- he was -- he stated, as I recall, on the cross-examination that he did not take her seriously.

It seems to me there's a factual issue here for the jury to decide whether the government proved beyond a reasonable doubt that rosetta soares was predisposed in those earlier conversations to

killing. Not talking about it, not wishful thinking, particularly with all of the psychiatric testimony, that whether or not she had the intent at the time, 1993, and I will say that no one's offered any expert opinion about that. But certainly with Mr. Delgado's testimony, there's a real question about what was said and what was intended during that conversation, and that should be something that the jury should decide, whether or not there was predisposition proved beyond a reasonable doubt by the government.

The Court: well, let me suggest to you that the Eleventh Circuit has said numerous times and more recently that a defendant who seeks to raise a defense of entrapment must first come forward with evidence sufficient to raise a jury issue that the government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it. A defendant will be considered to have met this burden if he produces any evidence that the governmental conduct created such a risk, but evidence that the government agent sought out and initiated the conduct with the defendant or was the first to propose the illicit transaction has been held to be insufficient to meet the defendant's burden.

The defendant must demonstrate not merely inducement or suggestion on the part of the government but an element of persuasion or at least mild coercion. The defendant may make such a showing by demonstrating that he had not favorably received the government plan and the government had to push it on him or that several attempts at setting up an illicit deal had failed and on at least one occasion he had directly refused to participate.

In my judgment, the government has made out their prima facie case in this regard on the first count completely. Now, as I've said, I have some reservations, and I will read what the government has submitted, but unless you're trying to convince me to the contrary, I lean more in your favor as to the issue on count 2.

Mr. Moniz: I'm speaking only of count 1, your honor. I agree with you.

The Court: Beg your pardon?

Mr. Moniz: I agree with you. I was only speaking of count 1 at this point regarding what I consider to be evidence of persuasive

conduct by the government, and in fact a statement by the defendant saying that "I don't want to do this." And I'm talking of course about the time period for which we've got tapes, October 11th through November 26th. It seems to me that there's a continued course of conduct by the government in constantly coming back to this.

The Court: Well, they may have constantly come back to it, but the crime had already been committed, and it was just being recommitted every time another phone call was made. The crime had probably been committed -- I think had been committed -- before the first tape was ever in existence.

Mr. Moniz: That's if there's intent, your honor, and that's what we don't have in front of us.

The Court: Well, the intent's a different issue. That's different from the entrapment.

Mr. Moniz: No, but in order to get to the crime, for the entrapment to come into play -- because entrapment only comes into play once we've gotten to the crime happening. You'd have to have that element satisfied, and, again, there's precious little evidence of that because we don't have --

Mr. Rufolo: It's a predisposition, your honor; it's not proof beyond a reasonable doubt that the crime was committed. Mr. Moniz is not suggesting --

The Court: I've made my mind up on count 1. And my mind's still open on count 2, but I've made up my mind on count 1.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 97-8548

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROSETTA LEE SOARES,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: HATCHETT, Chief Judge, BARKETT, Circuit Judge, and HILL, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor the other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
JAMES C. HILL
SENIOR UNITED STATES CIRCUIT JUDGE

U.S. Const., Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 1958 Use of interstate commerce facilities in the commission of murder-for-hire:

(a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

(b) As used in this section and section 1959--

(1) "anything of pecuniary value" means anything of value on the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage

(2) "facility of interstate commerce" includes means of transportation and communication; and

(3) "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

Propound the question.

Mr. Rufolo: How did you respond when she asked you to come to Atlanta in order to murder Tommy Nelson?

Mr. Delgado: I told her I would.

Mr. Rufolo: And how did she respond?

Mr. Delgado: She didn't believe me at first and -- she didn't believe me.

Mr. Rufolo: How did you leave it at the end of that conversation; do you recall?

Mr. Delgado: Yes. I told her that I would come down, and I asked her if she was -- if she really wanted to do this. She said yes.

Mr. Rufolo: What did you do after that?

Mr. Delgado: I told her I'd get back in touch with her. "Let me get my stuff together and see how I can work this out to get it done," and I'd call her back.

Mr. Rufolo: Did you take any steps toward carrying this out?

Mr. Delgado: Nno, I did not.

Mr. Rufolo: Why not?

Mr. Delgado: Because I didn't think it was something she really wanted to do, and I wasn't really interested in getting involved at the time.

Mr. Rufolo: Did you tell her that, that you weren't interested in getting involved?

Mr. Delgado: No. I just put her off, kept putting her off.

Mr. Rufolo: Did you have further telephone conversations with her following that about the same issue?

The Court: I'll overrule the objection. Go ahead.

Mr. Rufolo: You may answer

Mr. Delgado: No.

Mr. Rufolo: We can continue.

(Audiotape played)

Mr. Rufolo: Mr. Delgado, had you previously -- in your previous conversations with the defendant before you went to Agent Foster, had you discussed the idea that you were going to charge money for what she was asking you to do, to kill Tommy Nelson?

Mr. Delgado: Oh, yes.

Mr. Rufolo: And what amount had you discussed?

Mr. Delgado: 5,000.

Mr. Rufolo: Why is it that you were asking her whether or not she wanted to change her mind about this?

Mr. Delgado: I didn't -- from the beginning -- figure she'd have second thoughts after it was done.

Mr. Rufolo: And was this pursuant to the instruction that you had been given by agent foster that you told us about earlier?

Mr. Moniz: Objection.

The Court: I'll overrule the objection.

Mr. Delgado: Yes. However, but I've asked her from the beginning.

Mr. Rufolo: Now, the term that she used, bidet, did she know that you were in the business of selling bidets?

Mr. Moniz: Yes. As a result of your examination of the defendant, your review of both the transcribed conversations and tape-recorded conversations between the defendant and one Tony Delgado during the time period of October, 1995, through November, 1995, did you reach any opinion as it relates to her state of mind in talking to Mr. Delgado and her behavior during those conversations?

Ms. Saundra Maass-Robinson: Yes, I did.

Mr. Moniz: And could you tell us what your opinion was as it relates to her behavior with Mr. Delgado during those conversations between October and November, 1995?

Ms. Saundra Maass-Robinson: I think her -- it's my opinion that her behavior was at times confused, disorganized, reckless, showing poor judgment, indicative of a lot of anger, frustration, certainly depression. The behavior itself was indicative of a multitude of feelings and emotions and other influencing facts that were apparently going on in her life at the time.

Mr. Moniz: What factors did you take into account in forming this opinion or the factors that form the basis of this opinion regarding the confusion, the depression, the anger, and frustration exhibited during that time period?

Ms. Saundra Maass-Robinson: As I understood it, and focusing essentially on the time period of 1995 for my opinion -- and that's most of the information that I think is relevant and that I've included in my opinion -- but during 1995, particularly during the early months, miss soares spent a considerable amount of time downtown in the various state buildings and with attorneys to have put in place reliable child support, monies, for her son. This was a period of enormous frustration and feelings of just feeling -- in that frustration, feeling powerless, just being unable to get the system to respond to her demands for having -- receiving child support from her child's father. That was certainly -- consumed in fact a large part of her time during 1995.

Ms. Saundra Maass-Robinson: There's a lot of different ways, but the end result is to vent through and process through.

Mr. Moniz: Does venting during these situations necessarily carry with it a plan to carry out what one says?

Ms. Saundra Maass-Robinson: Does it necessarily?

Mr. Moniz: Right.

Ms. Saundra Maass-Robinson: No. It really -- I mean, it -- we often have -- I mean, we can create plans in our minds. We don't always carry them out.

Mr. Moniz: Did you, in observing the conversations between Mr. Delgado and Miss Soares, determine whether or not there was any real focus to -- withdraw that -- whether or not there was any plan that was formulated?

Ms. Saundra Maass-Robinson: There were pieces of plans that came up, and there were, it appeared -- certainly, from one conversation to the next, pieces of plans came up, pieces of plans were discarded, new pieces were created, and they were discarded. Some were ignore. It was that kind of random , both development and discarding, that appeared to be taking place during the course of the conversations.

Mr. Moniz: What significance does that have in terms of your opinion of Lee Soares' state of mind during this time period?

Ms. Saundra Maass-Robinson: Well, I think when you take that into consideration with just everything else going on, influencing your state of mind, the randomness of that, the discarding, the what appeared to be a lack of commitment, a lack of -- in her conversations, it suggested that this -- that this was not a purposeful series of actions that were being planned, but it was a random use of various techniques and means to vent and consider and think through and discuss her options or her feel -- and her feelings in this this. But the randomness of it suggests it ws not purposeful that -- you know, what to do with the various elements.

Mr. Moniz: And when you say "randomness," can you give examples? And I know you don't have the transcripts in front of you. Can you give examples of what you mean by that?

Ms. Saundra Maass-Robinson: Well, I think there were -- there were examples of it. One time she'd talk about -- she'd be discussing, I guess, her -- Mr. Nelson and what to do about him, and then we'd -- excuse me -- we'd jump over here, and we'd be talking either about a girlfriend and then, well, maybe it's the wife. Well, then let's go back, and we'll talk about -- and then she'd talk about some other piece of the relationship. And then I think we went over and we drew a map for one person's home, and then she's over here discussing somebody going to Florida.

I mean, it was -- it was a very scattered quality to all of this that, again, in the context of everything else, was probably -- I mean, it was not purposeful. It didn't really appear to, in the end, like I say, relieve -- you know, get to some point of saying, you know, there's relief, there's a catharsis here: "what we've talked" -- you know, "what I'm planning, what I'm thinking about, it's serving a purpose." It didn't. It just was, again, the -- it was the randomness of all of these various pieces in these conversations, no connection from one conversation to the next, that created, in my -- in my opinion, the lack of real purpose in what she was doing.

Mr. Moniz: Now, was there any significance, in your opinion, that Mr. Delgado grew up and was considered sort of family to Miss Soares that she was unable to vent to him as opposed to perhaps anyone else?

Ms. Saundra Maass-Robinson: Well, it certainly was my understanding that, like I -- that their relationships went way back. Families kind of shared common people in various ways. I don't know if they were either cousins or play cousins, people like that, but there was a commonness in their background, and in that sense, I would interpret that to mean that certainly there was trust and understanding. I mean, in the kind of emotional chaos that miss soares was involved at that time, the need to be able to kind of dump this stuff on someone who understood that, and whether or not -- and that tony, Mr. Delgado, was certainly apparently someone who she felt could kind of get in there and really empathize with, you know, her anger, her sense of unfairness that what this -- what had happened to her and what she couldn't achieve.

Mr. Moniz: Now, when one vents or goes through a catharsis that you've talked about, would it be unusual to reveal the ugliest, the darkest, feelings of anger and pain we might have?

Ms. Saundra Maass-Robinson: I'm sorry. Would it be unusual to --

Mr. Moniz: Sure. You were talking about venting. I used he term "venting."

Ms. Saundra Maass-Robinson: Right.

Mr. Moniz: And I think it's equivalent to "catharsis."

Ms. Saundra Maass-Robinson: Uh-huh.

Mr. Moniz: Would it be unusual for someone in a state of mind as the defendant was during this time period, knowing that she was speaking to someone who was considered sort of a family member -- would it be consistent to, or unusual, rather, to reveal some of the deepest, ugliest thoughts we have, such as harming someone?

Ms. Saundra Maass-Robinson: I don't think it's unusual. I think we've -- you know, it's not unusual to share that. More what would be unusual is what the other person does with the information. And I mean, with that, I'm not -- I should rephrase that.

Mr. Moniz: What do you mean by that?

Ms. Saundra Maass-Robinson: Right. I -- and I'm -- let me say that what really the difference is, when you share that information, "I'm so -- you know, I'm so angry at him, I wish I could kill him." In a position of trust with someone, the norm would be something to the effect that: "you don't mean that, do you? What do you mean by that? I mean, that's not really what you mean." In other words, an opportunity to at least what we would call reality test, being, you know: "Do you realize what you're saying? What do you mean by this," et cetera. That, in a relationship in which that's done -- I mean, in a relationship of trust, in normal circumstances, that's usually the interaction that happens.

Certainly, patients can come into your office, and it's an important part of determining. If they say, "I want to go out and hurt

somebody," your job as a professional is to check to see exactly: is there intent to do that? And I'm not going to -- I don't know if I should get into that, bu the point is: you begin to explore and to challenge them. I mean, "well, what are you planning on doing with that?"

And certainly the norm is, "well, really nothing. I just -- that's how angry I am."

And then you get beyond what the actual expressed behavior is, and you get into really what the feelings are about. And I don't want to confuse it, but that, in a relationship of trust and discussion with somebody, when we discuss our deepest, ugliest thoughts, if we're feeling at all comfortable to do that, it's in a context that -- in a context that hopefully the person is supportive and doesn't encourage you to go ahead and do that.

P-R-O-C-E-E-D-I-N-G-S

The Court: All right. The first question is: did you get the notebooks to them?

The Clerk: Yes.

The law clerk: Oh, yes.

The Court: Okay. They had asked for the notebooks so they wouldn't all have to use the same one, apparently.

I have another question. I'll read you the question, and then I'll be glad to receive your comments if you wish. "Should we consider the issue of entrapment on this case by the F.B.I?" Christopher Jones; December 17, 1996. I guess I know what your answer is, Mr. Moniz.

Mr. Moniz: I think they should.

Mr. Rufolo: You've heard my position on it, judge, and I think --

The Court: Well, I think your position's well taken under the law of this circuit. I'll deal with them on it.

Mr. Rufolo: What I suggest, your honor, is that the court simply instruct the jury that entrapment is -- as a matter of law, entrapment is not an issue in this case.

Mr. Moniz: What was the question again, your honor?

The Court: Beg your pardon?

Mr. Moniz: What was the question as asked?